(28) (24) (17)

Nos. 03-1116, 03-1120 & 03-1274

MOTION FILED
JUN 10 2004

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER M. GRANHOLM, et al.,
Petitioners,

v.

ELEANOR HEALD, et al.,
Respondents.

CHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, et al.,
Respondents.

JUANITA SWEDENBURG, et al.,
Petitioners,

v.

EDWARD D. KELLY, et al.,
Respondents.

---

n Writs of Certiorari to the United States
Courts of Appeals for the Second and Sixth Circuits

MOTION TO REALIGN PARTIES FOR PURPOSES OF BRIEFING, TO SET BRIEFING SCHEDULE FOR PARTIES AND AMICI, AND FOR EXTENSION OF TIME TO FILE BRIEFS

RECEIVED
JUN - 9 2004
OFFICE OF THE CLERK
SUPREME COURT U.S.

RECEIVED
JUN 0 8 2004
SUPREME COURT U.S.
POLICE DEPARTMENT

The States of Michigan and New York (petitioner in No. 03-1116 and respondent in No. 03-1274, respectively), together with petitioner in No. 03-1120 and all private respondents in No. 03-

1274, respectfully move this Court for an order realigning the parties in these consolidated cases (for purposes of briefing), setting a briefing schedule for parties and amici, and extending the time within which to file the parties' and amici's merits briefs.

1. On May 24, 2004, this Court granted three certiorari petitions arising from two different decisions from two courts of appeals: Granholm v. Heald (No. 03-1116; arising from the Sixth Circuit), MI Beer & Wine Wholesalers v. Heald (No. 03-1120; arising from the Sixth Circuit), and Swedenburg v. Kelly (No. 03-1274; arising from the Second Circuit). This Court consolidated the cases and limited review to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

2. Because the Second and Sixth Circuits respectively upheld and struck down New York's and Michigan's regulatory schemes, the public and private parties who seek to answer the question framed by this Court's order granting certiorari in the affirmative (hereinafter the statutes' "Challengers"), and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners if they are in

the Second Circuit case and as respondents if they are in the Sixth Circuit case. Conversely, the public and private parties who would answer this Court's question in the negative (hereinafter the statutes' "Supporters") and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners in the Sixth Circuit case and as respondents in the Second Circuit case.

3. Although the Michigan and New York statutes are different in respects that would make consolidated briefing infeasible, Movants believe that the Court will nonetheless benefit from coordination of arguments between parties and amici on each side of the question the Court has framed. Such coordination would be quite difficult if the Court were not to adopt a consolidated briefing schedule that realigns the parties to create conformity of posture and interests. Without such relief, parties who would be making substantively similar arguments would file their merits briefs at markedly different times, some as petitioners and some as respondents. In addition, amici on both sides of the question the Court has framed may choose to file with the respondents (in whichever case they agree with the respondents), which would disserve the Court by making it harder for Challengers and Supporters to address amici's arguments in an orderly fashion.

4. Movants submit that the question formulated by this Court's order granting certiorari suggests that those who assert the invalidity of Michigan's and New York's statutory schemes—*i.e.*, that those statutes "violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment"—should be required to set forth the bases for their challenge first. Movants therefore submit that Challengers and their amici should be realigned as petitioners for purposes of briefing these consolidated cases. Since that realignment, without more, would deprive (current) petitioners in Nos. 03-1116 and 03-1120 of the right to submit a reply brief—granting that right instead to (current) respondents in those cases—the Court should permit *both* Challengers and Supporters to submit reply briefs.

5. Movants also believe that a 21-day extension of the time within which to file the principal opening briefs for both Challengers and Supporters (and for amici supporting each party) will help the parties and amici better coordinate their efforts and will not prejudice the Court's timely consideration of these cases during October Term 2004.

6. In light of the foregoing, Movants respectfully request that this Court issue a scheduling order in these consolidated cases that directs Challengers (Swedenburg et al., petitioners in No. 03-1274, and Heald et al., respondents in No. 03-1116 and No. 03-1120) and Supporters (respondents in No. 03-1274 and

petitioners in No. 03-1116 and No. 03-1120) and their respective amici to file briefs on the merits, as well as reply briefs, in the following order:

(a) Opening Briefs for Challengers and their respective amici to be filed on or before July 29, 2004.

(b) Opening Briefs for Supporters and their respective amici to be filed on or before September 23, 2004.

(c) Challengers' Reply Briefs to be filed on or before October 28, 2004.

(d) Supporters' Reply Briefs to be filed on or before November 22, 2004.

7. Counsel for private respondents in No. 03-1274 contacted counsel for each Supporter and Challenger to ascertain their respective positions with respect to the relief sought by this motion. All parties in these cases support this motion, with two exceptions. First, Kenneth W. Starr, Esq., one of the counsel for respondents in Nos. 03-1116 and 03-1120, advised us that his clients oppose any realignment of parties and all other relief sought by Movants, with the exception of extensions of time to file the parties' principal briefs. Second, Clint Bolick, Esq., Counsel of Record for petitioners in No. 03-1274 advised us that he objects to the relief sought by Movants only

insofar as any order realigning parties would also permit Supporters to file a reply brief.

Respectfully submitted,

Miguel A. Estrada, by permission, on behalf of all movants.

MICHAEL A. COX
Attorney General of the State of Michigan

THOMAS L. CASEY
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

DONALD S. MCGEHEE
Assistant Attorney General

Counsel for State of Michigan
Petitioners, No. 03-1116

ELIOT SPITZER
Attorney General of the State of New York

CAITLIN J. HALLIGAN
Solicitor General
Counsel of Record
120 Broadway
New York, NY 10271
(212) 416-8016

DANIEL SMIRLOCK
Solicitor General

ERIC A. JOHNSON
Assistant Solicitor General of Counsel

Counsel for State of New York
Public Respondents, No. 03-1274

RECEIVED
JUN 08 2004
SUPREME COURT U.S.
POLICE DEPARTMENT

CM0067
1745

HOWARD GRAFF
DEBORAH A. SKAKEL
VICTORIA A. KUMMER
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
1177 Avenue of the Americas
New York, NY 10026
(212) 835-1400

ROBERT M. HELLER
KRAMER LEVIN NAFTALIS & FRANKEL LLP
919 Third Avenue
New York, NY 10022
(212) 715-9100

J. WAREN MANGAN
O'CONNOR & MANGAN P.C.
One Hunter Street
Long Island City, NY 11101
(718) 361-7950

JOHN O'MARA
DAVIDSON & O'MARA, P.C.
243 Lake Street
Elmira, NY 14901
(607) 733-4635

MIGUEL A. ESTRADA
Counsel of Record
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

RANDY M. MASTRO
MICHAEL G. HONEYMAR, JR.
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

ALAN J. GARDNER
VERINI & GARDNER
225 Broadway
New York, NY 10007
(212) 227-1700

Counsel for Private Respondents, No. 03-1274

Of Counsel:
LOUIS R. COHEN
C. BOYDEN GRAY
TODD ZUBLER
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ANTHONY S. KOGUT
Counsel of Record
JOHN A. YEAGER
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Avenue, Suite 500
East Lansing, MI 48826
(517) 351-6200

Counsel for Petitioner, No. 03-1120